delivery. Clauses 4 and 5 of the deed of dissolution have already been set out above.

Construing the deed of dissolution as a whole, I was of the view that it was the intention of the parties to make a clean break of the partnership with effect from the date of dissolution. Any debts, liabilities or obligations of the partnership that accrued prior to the dissolution became those of the deceased as continuing partner under clause 4 of the deed. It was also the intention of the parties that the income of the partnership for the preceding nine and a half months immediately prior to the dissolution, the accounts of which were not available at the date of dissolution, would accrue to the continuing partner. Likewise, the continuing partner would be liable for any tax payable in respect of that income and would have to indemnify the plaintiff and keep him indemnified in respect of the tax assessed and paid on that income, pursuant to clause 4. I found further support for this interpretation in clause 5 of the deed of dissolution by which each partner released the other from all proceedings, accounts, costs, claims and demands in respect of the partnership but **without prejudice to any rights or remedies under the provisions of the deed** (emphasis added). Hence, the continuing partner was discharged from all obligations to account for the income of the partnership in respect of the period in question, and where the plaintiff became liable for the payment of tax and other obligations of the partnership after the date of dissolution, clause 4 provided for the continuing partner to indemnify the plaintiff. If as Encik Khoo contended the RM600,000 paid to the plaintiff took into account the income of the partnership for the period in question (which income was not yet known at the date of dissolution), there would have been no need to have clause 4 inserted in the deed of dissolution.

I therefore gave judgment for the plaintiff in terms of the statement of claim as finally amended by the consent of the parties on the 17 August 1993. Interest at 8% per annum was awarded on the judgment sum with effect from 11 April 1983 which was the date of the payment of the tax by the plaintiff. By consent of the parties, costs were awarded to the plaintiff on the sessions Court scale.

LYE FONG WENG & ANOR.

v.

DEPUTY MINISTER OF HOME AFFAIRS & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL APPLICATIONS NO. 44-6-93 & 44-7-93]
16 JULY 1993

HABEAS CORPUS: Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Failure by Superintendant of Rehabilitation Centre to supply Form 1 to detainee pursuant to r. 3(2) Public Order and Prevention of Crime (Procedure) Rules 1972 - Whether non-compliance thereof fatal.

HABEAS CORPUS: Burden of proof - Duty to prove legality of detention - Whether duty rests throughout with the detaining authority.

The two applicants in this case were ordered to be detained at the Rehabilitation Centre at Pulau Jerejak, Penang (the centre) pursuant to two seperate orders made by the respondent under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The facts showed that on their arrival at the centre none of the applicants were given copies of Form I as required by R. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972, to enable them to make representations should they so desire. In his affidavit the Superintendant of the centre did not specifically say that he had complied with the requirement of the Rule and the Deputy Superintendant, on his part, only stated generally that he had informed and reminded the two applicants of their right to make representations pursuant to the said Rule, without specifically stating that the duo were in fact provided with copies of the said Form 1.

The facts further showed that on 5 April 1993 the applicants were taken out from the centre and brought to Kuala Lumpur to attend a Court case and in the course of their journey both were kept in the lock-ups at the police station in Ipoh, Perak. In the order issued by the Deputy Superintendant of the centre enabling the first applicant to be taken to Kuala Lumpur, it was only stated that, "whilst in Kuala Lumpur the applicant was to be kept at Lokap D9, Ibu Pejabat Polis Kontinjen, Kuala Lumpur".

The applicants applied for a writ of *habeas corpus* on the grounds firstly, that their detention at the centre was illegal as there was a breach of R. 3(2) of the 1972 Rules and secondly, that they had been detained at Ipoh police station in breach of s. 13 of the 1969 Ordinance.

Held:

[1] Strict compliance with statutory provisions is required when depriving a person of his liberty. In this case mere reference to R. 3(2) of the Rules in the affidavit of the Deputy Superintendant, without proper particularisations, is insufficient to show compliance thereto and such disobedience vitiated the order of detention made against the applicants.

[2] The act of detaining both the applicants at Ipoh police station is incidental to the main purpose of bringing them to Kuala Lumpur and not a case of the applicants being transfered from one detention centre to another. Therefore the relevant provision is s. 13 and not s. 12 of the 1969 Ordinance. Since the wordings of in s. 13 of the Ordinance are couched in clear and unequivocal terms, legal effect must be given to it.

[3] The order of the Deputy Superintendant of the centre dated 5 April 1993 did not state that in the course of taking both the applicants from the centre to Lokap D9, Ibu Pejabat Polis Kontinjen, Kuala Lumpur, the applicants were to be detained at Ipoh police station. Devoid of such evidence the detention of both applicants at Ipoh police station are clearly unlawful.

[4] In a writ for *habeas corpus* the detaining authority has the burden of proving that the detention of the subject is lawful and such burden remains throughout with the detaining authority.

[Application for habeas corpus granted].

Cases referred to:

Re Datuk James Wong Kim Min [1976] MLJ 245 FC, Ex parte Johannes Choeldi & Ors. [1960] MLJ 184 ***(refd)***

Goh Thong Hua v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. [1991] 1 CLJ 692 ***(refd)***

Overseas Investment Pte. Ltd v. Anthony William O'Brien & Anor. [1988] 3 MLJ 332 ***(refd)***

Liew Kim Swee v. Menteri Dalam Negeri, Malaysia & Anor. [1991] 1 CLJ 53 ***(refd)***

Puvanesawaran a/l Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor. [1991] 2 CLJ 1199 ***(foll)***

Low Teng Hai v. Menteri Dalam Negeri Malaysia & Anor. [1992] 2 CLJ 1038 ***(refd)***

Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 MLJ 382 SC ***(refd)***

Public Prosecutor v. Koh Yoke Koon [1988] 2 MLJ 301 ***(refd)***

Oo Hua Lai v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. [1990] 2 CLJ 368 ***(refd)***

Lim Thean Lee v. Inspector General of Police & Ors. [1991] 3 MLJ 471 SC ***(refd)***

Karpal Singh v. Inspector General of Police & Ors. [1989] 1 MLJ 189 SC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, s. 9 (3)

Delegation of Powers Act 1965

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 5(3), 12, 13(1)

Public Order and Prevention of Crime (Procedure) Rules 1972, r. 3(2)

For the applicants - V. Shanmugam; M/s. Shanmugam & Co.

For the respondents - Mahmud bin Hj. Abdullah, Federal Counsel

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

As both parties agreed, the two criminal applications were heard together, both having the same factual basis except for the dates of the detention orders that were made.

In regard to criminal application No. 44-6-93, the detainee was ordered on 6 March 1993 by the Minister for Home Affairs to be detained for a period of 2 years at the Rehabilitation Centre at Pulau Jerejak, Penang. The detention order was made by the Minister for Home Affairs Acting pursuant to the powers conferred upon him by s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the 1969 Ordinance"). The ground upon which the order of the Minister was based was that the detainee is a member of an armed robbery gang and had terrorised certain segments of the community thereby threatening public order.

Whereas in criminal application No. 44-7-93, the Minister for Home Affairs acting under s. 4(1) of the 1969 Ordinance detained the detainee by an order dated 10 March 1993 for a period of 2 years at the Rehabilitation Centre at Pulau Jerejak, Penang. The ground of detention was akin to that of criminal application 44-6-93.

Both the applicants challenged the validity of the detention orders on two grounds:

(1) that there was a breach of r. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 ("the Rules") made pursuant to s.. 5(3) of the 1969 ordinance; and
(2) that there was a breach of s. 13 of the 1969 Ordinance.

In regard to the first ground, I need to quote in verbatim Rule 3 of the Rules which is as follows (the relevant parts only):

> 3.(1)When any person is brought to a place of detention in pursuance of a detention order it shall be the duty of the Officer in Charge to inform him, as soon as practicable after his arrival, of his right to make representations against the detention order within the time and in the manner hereinafter provided.
>
> (2) It shall be the duty of the Officer in Charge, when informing any detained person of his right to make representations, to provide him with two copies (or, if the detained person states that he intends to engage an advocate to represent him, three copies) of Form I in the Schedule.
>
> (3) The detained person shall if he desires to make representations, complete one copy of the form in time to enable the Officer in Charge to forward it to the secretary not more than fourteen days after the arrival of the detained person at the place of detention, and it shall be the duty of the Officer in Charge to forward the form to the secretary before the expiry of that period.

Now, in regard to criminal application No. 44-6-93, the Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, in his affidavit, did not advert to nor specifically say that he had complied with Rule 3(2) of the Rules. But the Deputy Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, had this to say in his affidavit with regard to his compliance with Rule 3(2) of the Rules:

> ... Sebaik sahaja Pemohon tiba, saya telah memberitahu, menerangkan dan mengingatkan Pemohon tentang haknya untuk membuat representasi menurut Kaedah 3(2) Kententeraman Awam dan Mencegah Jenayah (Prosedur) 1972 kepada Lembaga Penasihat. Pemohon juga telah diterangkan tentang haknya untuk mendapatkan khidmat peguam. Saya telah menggunakan Bahasa Malaysia yang mudah difahami oleh pemohon dan pemohon telah mengakui memahami Bahasa Malaysia setelah saya bertanya kepadanya sama ada beliau faham atau tidak penerangan saya.

This averment does not state that the Deputy Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, did provide the detainee with two copies of Form 1 (where the detainee does not intend to engage Counsel). Nor does this averment say that the Deputy Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, did provide the detainee with three copies of Form l (where the detainee intends to engage an advocate). With respect, mere reference to Rule 3(2) of the Rules by the Deputy Superintendent in his affidavit is insufficient, without particularisations, bearing in mind the principles that strict compliance with statutory requirements must be observed when depriving a person of his liberty and that since the liberty of a subject being detained without trial is involved, strict statutory compliance must be adhered to. It is now settled law that where personal liberty is concerned, an applicant in applying for a write of *habeas corpus* is entitled to rely on any technical defect that will ultimately set him at liberty (see *Re Datuk James Wong Kim Min* [1976] MLJ 245 FC, *Ex parte Johannes Choeldi & Ors.* [1960] MLJ 184). It is interesting to note that the Deputy Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, adverted to the delegated power under s. 13 of the 1969 Ordinance that was "purportedly" accorded to him by the Deputy Minister of Home Affairs under the Delegation of Powers Act 1956 *vide* PU (B) 550 dated the 23 September 1992 ("the delegated power"). However, the delegated power was specifically given to the Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, **and not to** a Deputy Superintendent. Hence, whatever was averred to in the affidavit of the Deputy Superintendent, in terms of its weight, should be taken with a pinch of salt. In a trial by affidavits between both parties, the need to be specific cannot be overestimated (see *Goh Thong Hua Iwn (1) Menteri Hal Ehwal Dalam Negeri Malaysia (2) Pengarah Pusat Pemulihan Akhlak Pulau Jerejak, Pulau Pinang* [1991] 3 Kanun (2) 118 edisi bulan Jun).

Whereas in criminal application 44-7-93, the Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, deposed in his affidavit affirmed on 24 June 1993 in exactly the same words as that used by the Deputy Superintendent as stated earlier. Suffice it to say that the

affidavits of the respondents were prepared in stereotype fashions which did not commend well to the readers. There were far too many stereotyped paragraphs being employed in the affidavits of the respondents. Since a *habeas corpus* case is to be decided entirely on the contents of the affidavits, the need to particularise details becomes more acute and onerous (see *Overseas Investments Pte Ltd v. Anthony William O'Brien & Anor.* [1988] 3 MLJ 332 and *Liew Kim Swee v. Menteri Dalam Negeri, Malaysia & Anor.* [1991] 1 CLJ 53). After all, it had been said that sometimes the truth seeps out of an affidavit.

Be that as it may, Edgar Joseph Jr. J. (as he then was, now a Supreme Court Judge) discussed in great detail Rule 3(2) of the Rules in *Puvaneswaran a/l Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1991] 2 CLJ 1199 and his Lordship held that the requirement to deliver to the detainee the requisite number of copies of Form I was not a directory but a mandatory requirement, the breach of which rendered the detainee's detention unlawful. L.C. Vohrah J. in *Low Teng Hai v. Menteri Dalam Negeri Malaysia & Anors.* ([992] 2 CLJ 1038, in considering whether there was a breach of Rule 3(3) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 made pursuant to s. 9 (3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 applied in toto the principles laid down in *Puvaneswaran's* case and came to the same conclusions. It must be stressed here that disobedience to the mandatory requirements of Rule 3(2) of the Rules made pursuant to s. 5(3) of the 1969 Ordinance and for the purpose of protecting the subject detained without trial, would vitiate any order of detention made, even if, there is no semblance of prejudice to the subject.

Encik Mahmud bin Hj. Abdullah, the federal counsel appearing for the respondents, rightly conceded that there was a failure to comply with the mandatory provisions of Rule 3(2) of the Rules. Thus, on the first ground, the applicants succeed.

I now proceed to consider the second ground.

It is the contention of Encik V. Shanmugam, learned Counsel for both applicants, that on 5 April 1993, both the applicants were taken out from the Rehabilitation Centre at Pulau Jerejak, Penang, and brought to Kuala Lumpur to attend a Court case on 11 April 1993 and in the course of their journeys, both the applicants were kept in the lock-ups at the police station in Ipoh, Perak (see paragraphs 13 of the applicants' affidavits). The Deputy Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang, in exercise of his "purported" delegated power, averred in his affidavit in criminal application 44-6-93, that he issued an order under s. 13(1) of the 1969 Ordinance enabling the applicant to be taken to Kuala Lumpur to attend a Court case and, whilst in Kuala Lumpur, the applicant was to be kept at "Lokap D9, Ibu Pejabat Polis Kontinjen, Kuala Lumpur." Learned Counsel for both applicants swiftly pounced upon the respondents and argued that the detention of the applicant in criminal application 44-6-93 at the lock-up in Ipoh police station was outside the scope of the Deputy Superintendent's order and hence rendering such detention unlawful. The position would be more acute, he submitted, in criminal application 44-7-93 as the affidavits of the respondents did not even aver to the allegations in paragraph 13 of the applicant's affidavit thereof. It has been said that an affidavit must specifically reply to allegations otherwise those allegations are deemed to have been accepted, without more (see *Alloy Automotive Sdn. Bhd. v. Perusahaaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382 SC).

The issue on the second ground revolves on the question as to whether the detention of both applicants at Ipoh police station in the course of bringing them to Kuala Lumpur to attend a Court case is lawful.

I entirely agree with the learned Counsel for the applicants that s. 12 of the 1969 Ordinance has no application in this case in that this is not a case of the applicants being transferred from one detention centre to another (*Public Prosecutor v. Koh Yoke Koon* [1988] 2 MLJ 301). The act of detaining both the applicants at Ipoh police station is incidental to the main purpose of bringing them to Kuala Lumpur. Therefore, the relevant provisions is s. 13 of the 1969 Ordinance which states:

> 13. (1) On proof to his satisfaction that the presence at any place of any person detained under the provisions of s. 4, or lawfully in the custody of the police or confined in any prison whether in pursuance of the provisions of s. 4 or under an order of any Court or otherwise howsoever, and notwithstanding any order of any Court or other authority what-

soever, is required in the interests of justice, or for the purpose of any public or other inquiry, or in the national interest, or in the interests of the person detained, in custody or confined, the Minister may order that such person be taken to that place.

(2) Any person in course of being taken to any place inpursuance of the provisions of sub-section (1) and whilst at such place shall be kept in such custody as the Minister may direct and whilst in that custody shall be deemed to be in lawful custody.

Since the wordings in s. 13 of the 1969 ordinance are couched in clear and unequivocal terms, legal effect must be given to it. The operative part of s. 13(2) of the 1969 Ordinance lies in the following words: "... as the Minister may direct ...". Now, it is worthy to note that in the order of the Deputy Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang dated 5 April 1993 referred to earlier, nowhere did it state that in the course of taking both the applicants from the Rehabilitation Centre at Pulau Jerejak, Penang to Lokap D9, Ibu Pejabat Polis Kontinjen, Kuala Lumpur, the applicants were to be detained at Ipoh police station. Devoid of such evidence, the detention of both applicants at Ipoh police station are clearly unlawful. In short, the detention of both the applicants at Ipoh police station, done not according to law must surely be illegal (see *Oo Hua Lai v. Menteri HaI Ehwal Dalam Negeri Malaysia & Anor.* [1990] 2 CLJ 368, which was referred to and approved by the Supreme Court in *Lim Thean Lee v. Inspector General of Police & Ors* [1991] 3 MLJ 471 SC). I might as well add, that in an application for a writ of *habeas corpus* the detaining authority has the burden of proving that the detention of the subject is lawful (*Karpal Singh v. Inspector General of Police & Ors* [1989] 1 MLJ 189 SC). Such burden of proof remains throughout with the detaining authority. The subject, on the other hand, is entitled under the law to avail himself of any technical defect which may invalidate the order which deprives him of his personal liberty guaranteed under article 5(1) of the Federal Constitution (*Public Prosecutor v. Koh Yoke Koon* [1988] 2 MLJ 301).

The second ground succeeds and consequently the applications for *habeas corpus* are granted and the applicants are hereby ordered to be set free forthwith.

MUI FINANCE BERHAD

v.

MENTERI KEWANGAN, MALAYSIA

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[ORIGINATING MOTION NO. 25-3-1992]
18 DECEMBER 1993

ADMINISTRATIVE LAW: Exercise of discretionary power by Minister - Appeal for release of motor vehicle seized by Customs - Section 129, Customs Act 1967 - No reason given by Minister for rejection of appeal - Rejection based on policy to reject all applications made by financial institutions - Whether discretion not properly exercised - Whether basis of rejection discriminatory.

CERTIORARI: Exercise of discretionary power by Minister - Reason for making order not stated - Whether Court had power in such circumstance to grant prerogative order.

PRACTICE & PROCEDURE: Application to extend time to file notice of motion - Whether O. 53 r. 3 Rules of the High Court 1980 complied with - Whether O. 53 r. 3 applies to application for leave that was heard inter-partes.

This was an appeal by the respondent against the order of Court granting leave for the issue of *certiorari* to the applicant to quash the decision of the respondent. The facts were that sometime in 1991 a motor lorry belonging to the applicant was seized by the Customs and subsequently ordered to be forfeited by the learned Magistrate. On 12 September 1991 the applicant appealed to the respondent under s. 129 of the Customs Act 1967 for the return of the lorry. The appeal was rejected but no reason whatsoever was given by the respondent for the rejection apart from stating " bahawa adalah menjadi dasar Perbendaharaan untuk menolak permohonan daripada syarikat kewangan". Leave was granted by the Court for the issue of *certiorari* to quash the decision of the respondent and hence the present appeal. The primary issue that arose was whether in rejecting the appeal the respondent had failed to exercise his discretion correctly under s. 129 of the Act and if so, whether, on that ground, the Court could issue an order of *certiorari* to quash the said order of the respondent.